FILE COPY

No. 704

In the

Supreme Court of the United States

ROBERT FOSDICK,

Appellant,

vs.

SAMUEL O. LINZELL, Director of Highways,
STATE OF OHIO,

Appellee.

On Appeal From the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

(a) An action to enjoin the taking of private property when neither trial or appellate courts have found it necessary for public use but on the contrary trial court factually found that more than fifty percent was needed and appellate court upon same record found improvement blankets the property neither court finding as a fact all the property was necessary for a public improvement.

(b) Judgment entries of Supreme Court of Ohio, Wednesday, October 22, 1958, dismissing Motion to Certify and petition filed as of right for the reason that no debatable constitutional question is involved in this cause.

(c) Courts jurisdiction rests upon Fifth and Fourteenth Amendments to the United States Constitution.

A case in law or equity may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either Per Marshall, C.J. in *Cohm* v. *Virginia*, 6 Wheaton 264, Title 28, page 102, chap. 85, U.S.C.A. In the case that this matter however is not considered appealable, 28 U.S.C., 3 2103 is cited, and any other denial of federal right whether or not capable in itself of being brought here by appeal: *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547.

Appellant appeals from the refusal of the Supreme Court of Ohio to review this cause. Motion to Certify and Petition filed as of right were dismissed on motion Oct. 22, 1958. Action was to enjoin the taking all or part of Plaintiff's office property by eminent domain. Trial Court in separate finding of fact and conclusions of law (attached hereto, Appendix) found condemnor needed more than fifty percent of property, yet refused injunction entirely. Judgment and fact finding are not consistent. Deposition of Cincinnati Highway engineer (presented in record) showed none of the physical road improvements that was to be placed upon Plaintiff's property and he testified he worked in close collaboration with Defendant, and that there is a distance of 170 ft. between road and Plaintiff's property. In the *Vester* case, 281 U.S. 439, which was litigated entirely in the Federal courts, this Court affirmed the decisions of the low courts in favor of property owner, disallowing excess condemnation. Article 1, Section 19, Ohio Constitution holds private property must be held forever inviolate but subject to public use.

This Court as recently as September 29, 1958 in *Cooper* v. *Arron*, declared the Fourteenth Amendment to the United States Constitution to be the Supreme Law of the land and we think that herein not only the Fourteenth but also the Fifth Amendment of the United States Constitution has been violated herein. Also in the record it is

shown that the first taking for which bond money was voted did not include property of plaintiff which was not taken until federal funds were obtained. In *Thompson* v. *St. Louis*, 253 S.W. 969 at 972, line 21, city was limited to use for which money was voted and not some different, enlarged or changed plan. *Litchfield* v. *Bridgeport*, 103 Conn. 565. Courts will not countenance any attempted misuse of the delegated sovereign power of condemnation to the detrement of the owners rights. *Sargent* v. *City of Cincinnati*, 110 O.S. 444, 159 O.S. 525; *Mfg. Co.* v. *Cleveland*, 160 O.S. 525. Supporting this principle is text in 18 Am. Jur., 736, Section 110 and cases cited.

The record as well as the courts findings and entries which are appended hereto disclose that some or all of Plaintiff's property is not needed. Defendant asked to condemn 650 feet of property at this point to build two strips of roadway of 42 feet in width with a divider of 125 feet all of which is 170 feet north of Plaintiff's north property line.

JOURNAL ENTRY DENYING PLAINTIFF'S PETITION FOR TEMPORARY RESTRAINING ORDER

COURT OF COMMON PLEAS
Hamilton County, Ohio — Case No. A-161872

(CAPTION)

This cause came on to be heard upon the motion of Plaintiff for a temporary restraining order and upon the pleadings, and upon the evidence, and was submitted to the Court. Upon consideration thereof the Court finds upon the issue joined in favor of the Defendant.

It is, therefore, CONSIDERED, ORDERED, ADJUDGED, and DECREED by the Court that Plaintiff's motion for a temporary restraining order is hereby denied and that Plaintiff's petition be and the same is hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS

Hamilton County, Ohio – No. A-161872

(Entered January 8, 1958.)

(CAPTION)

HOY, J.:

At the request of the plaintiff the Court hereby sets forth its Findings of Fact separate from its Conclusions of Law herein.

FINDINGS OF FACT.

1. From the evidence adduced by the plaintiff I find that under the present plans for the construction of the Third Street Distributor in Cincinnati, by the Department of Highways of the State of Ohio, one of the ramps which are integral parts of the improvement, will extend over more than fifty per cent of plaintiff's property.

2. It is necessary for the public convenience and welfare to appropriate plaintiff's property for said improvement.

CONCLUSION OF LAW.

1. The burden rests upon the plaintiff to proveby preponderance of the evidence that the Director of Highways is not entitled to proceed further with the appropriation of plaintiff's property in case No. A-153458 now pending in this court.

2. Plaintiff has failed to produce any evidence which would justify the Court in enjoining the defendant from proceeding in said appropriation suit.

CARSON HOY, Judge

OPINION OF COURT OF APPEALS
First Appellate District of Ohio
Hamilton County, No. 8426

(CAPTION)

BY THE COURT.

The Court finds the equities to be in favor of the defendant-appellee. A decree similar to the decree entered in the Court of Common Pleas will be entered in this Court.

HILDEBRANT, P. H., MATTHEWS & LONG, J. J., CONCUR.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF COURT OF APPEALS
First Appellate District of Ohio
Hamilton County, No. 8426

(CAPTION)

FINDINGS OF FACT

1. From the evidence presented by defendant-appellee and plaintiff-appellant, the Court finds that the plans for the construction of the Third Street Distributor in Cincinnati by the Department of Highways of the State of Ohio call for the improvement and construction to completely blanket plaintiff's property.

2. That it is necessary for the public convenience and welfare to appropriate plaintiff's property for said improvement.

CONCLUSION OF LAW

1. The Plaintiff has wholly failed to produce any evidence which would justify the Court in enjoining the defendant from proceeding in said appropriation suit.

ORDER OF SUPREME COURT OF OHIO DISMISSING APPEAL

No. 35663

(October 22, 1958.)

(CAPTION)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, Ohio, upon the motion of appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant his costs herein expended, taxed at $——.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry."

(DULY CERTIFIED.)

MOTION TO CERTIFY OVERRULED BY SUPREME COURT OF OHIO

No. 35663

(October 22, 1958)

(CAPTION)

It is ordered by the Court that this motion be, and the same hereby is, overruled.

(DULY CERTIFIED.)